REASONS FOR GRANTING REHEARING AND ISSUING THE WRITS

1. Subsequent to the filing of the petitions for certiorari in the instant cases, this Court's decision in *McMahon* v. *United States,* No. 17, this Term, decided November 5, 1951, was handed down. The seeming similarity between the statute of limitations issue decided in the *McMahon* case and the issue presented by the instant cases indicates the possibility that the *McMahon* decision may have been deemed determinative of the issues in the instant cases. The substantial differences between the *McMahon* case and the instant cases, as revealed by the Court's opinion in the former, are, we believe of such a nature as to warrant independent review by this Court of these cases. We are impelled to point out the substantial considerations quite different from the controlling factors in the *McMahon* case because the issues presented here are of great importance to the Government not only because of the numerous other pending claims entirely barred by the decisions below but because of their disruption of long-standing enforcement procedures and the impracticability of devising new procedures in conformity with them (see Petition for Writ of Certiorari in No. 293, pp. 7–12).

The holding of the *McMahon* decision that the two-year statute in the Suits in Admiralty Act runs from the date of the actionable wrongs

rather than from the date of the administrative disallowance of the seaman's claim against the Government rests upon the particular legislative situation there involved and upon other grounds not present in the instant cases. This is made clear by the *McMahon* opinion.

The primary ground for the decision in *McMahon* appears to be contained in the following paragraph:

> It [the Suits in Admiralty Act] was enacted several years before suits such as the present, on disallowed claims, were authorized. Certainly during those years the limitation depended upon the event giving rise to the claims, not upon the rejection. When later the right to sue was broadened to include such claims as this, there was no indication of any change in the limitation contained in the older Act.

The situation here is precisely the reverse. The statute of limitations is part of the Portal-to-Portal Act of 1947, enacted some 11 years after the Walsh-Healey Public Contracts Act which gives rise to the substantive claim. During this entire 11-year period, the statute was consistently construed and enforced on the assumption that the administrative determination of liability, and not the violation itself, gave rise to the claim on which suit could be brought. This ground of the *McMahon* decision is, therefore, entirely lacking in these cases.

Another basis of the *McMahon* decision is that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." This principle, far from supporting the decision of the Courts of Appeals in the instant cases, suggests the applicability of the equally well established principle that statutes of limitation "are to be construed strictly in favor of the sovereign." *United States* v. *Whited & Wheless,* 246 U. S. 552; *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640; *Du Pont de Nemours & Co.* v. *Davis,* 264 U. S. 456. Application of this principle in the instant case would plainly require reversal of the decisions below.

The remaining reason specified in the *McMahon* opinion is that:

> Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus *to delay indefinitely knowledge by the Government that a claim existed.* We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of *an action against the United States.* [Emphasis supplied.]

In the instant cases, on the other hand, the statute of limitations has been construed by the

Courts of Appeals in such a manner as to prejudice claims *by* the Government and to start the period running before there is opportunity for the acquisition of "knowledge by the Government that a claim existed." Unlike the situation in the *McMahon* case, where the claimant knows immediately of the injury out of which his claim arises, and unlike the case of the underpaid employee who is in a position to know of the violation at the time it occurs, violations of the Public Contracts Act do not come to the attention of the Government until an investigation can be conducted, which may be long after the violations have occurred. Thus, much, if not all, of a two-year period may have expired before the violations even come to the attention of the Government. This consideration strongly suggests a legislative intent quite different from the legislative intent in the *McMahon* situation. Cf. *United States* v. *Wurts,* 303 U. S. 414; *Woods* v. *Stone,* 333 U. S. 472, 477.

2. A question expressly left unresolved in the *McMahon* case because of the deficiencies in that record is presented by one of the instant cases, *i. e.,* the question "whether the statute of limitations is tolled" pending completion of the requisite administrative proceedings.

Unlike the record in *McMahon,* the record in the *Lovknit* case, No. 294, does disclose the date on which the administrative complaint was filed (R. 8), the date on which the administrative deci-

sion became final (R. 9–10), the dates on which the under-age minors were knowingly employed (R. 47–50), and the date on which complaint was filed in the district court to enforce the administrative award (R. 7). If the two-year period, assuming it is applicable, is tolled during the pendency of the administrative proceedings, as suggested by the *McMahon* opinion, that part of the claim here presented which arose subsequent to November 4, 1945, would not be barred (R. 49). Though a relatively small portion of this particular claim would be thus saved, such a modification of the decision of the courts below would substantially mitigate the drastic effects of that decision, and might afford a practicable means of devising effective new procedures.[1]

As the administrative proceedings, under the scheme of this Act, involve the duty of hearing witnesses and making the findings of fact and decision which are ordinarily part of the judicial process, it seems appropriate that the time consumed thereby should not be charged against any period of limitation. Where judicial review is not based on administrative proceedings, the functions of taking evidence and appraising it occur after

[1] As pointed out in the petition for certiorari in No. 293 (Pet. pp. 7–8), the Government's claims in some 45 pending cases (representing all but eight of the total number of pending cases) are entirely barred under the decision below. At least part of the Government's claim would be preserved in over half these cases if the statute of limitations is tolled during the administrative proceedings.

the limitations period is tolled by the filing of a complaint in court. Also, another purpose of the statute of limitations is to compel the initiation of formal proceedings, and this purpose is served by the institution of administrative proceedings.

3. A further reason for this petition for rehearing is that there is additional substantial ground in this Court's decisions on the "primary jurisdiction" doctrine, which were not called to the Court's attention in the petitions for certiorari, supporting the Government's position that an administrative decision is an indispensable prerequisite to judicial decision, and, therefore, that the Government's cause of action under the Walsh-Healey Act accrues only after an administrative determination of liability. See *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439–442; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295; *Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437.

The ruling in the decisions below, that the Walsh-Healey Act does not contemplate administrative proceedings as a basis for suits by the Attorney General, appears wholly inconsistent with these decisions of this Court. Since the Court's holdings in those cases related to a statutory provision expressly giving the shipper a right to pro-

ceed before the Commission or before the courts, but not both, it seems clear that the same result should be reached under the Walsh-Healey Act where the statute plainly implies that the court action must follow and be based on the administrative award, and such has been the uniform administrative practice for 15 years. (See Petition in No. 293, pp. 17–21). This rule has not been restricted to the Interstate Commerce Act. See *Kelly* v. *Union Stockyards*, 190 F. 2d 860, 863 (C. A. 7), decided under the Packers and Stockyards Act, which provides a cause of action for persons injured by its violation, and that "Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction." See also *Addison* v. *Holly Hill Co.*, 322 U. S. 607; *Fed. Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37; *Fed. Comm. Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Ford Motor Co.* v. *Nat. Lab. Rel. Bd.*, 305 U. S. 364. No sound reason appears why it should not be applied to the Walsh-Healey Act, where uniformity in administration and interpretation are equally necessary.

CONCLUSION

For the reasons set forth above and in the petitions for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, writs of certiorari issue to the

Courts of Appeals for the Fourth and Fifth Circuits, respectively.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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